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10 **UNITED STATES BANKRUPTCY COURT**
 11 **DISTRICT OF NEVADA**

12 In re:

13 USA COMMERCIAL MORTGAGE
 14 COMPANY,

15 Debtor.

16 Case No. BK-S-06-10725-LBR

17 Chapter 11

18 **SECOND OMNIBUS OBJECTION
 19 OF USACM TRUST TO PROOFS OF
 20 CLAIM BASED ENTIRELY UPON
 21 INVESTMENT IN THE MOUNTAIN
 22 HOUSE LOAN**

23 **Date of Hearing: July 26, 2011**
 24 **Time of Hearing: 1:30 p.m.**
 25 **Estimated Time for hearing: 10 min.**

26 The USACM Liquidating Trust (the "USACM Trust") moves this Court, pursuant to § 502 of title 11 of the United States Bankruptcy Code (the "Bankruptcy Code") and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for an order disallowing the Proofs of Claim listed in **Exhibit A**. These claims were filed by investors ("Direct Lenders") against USA Commercial Mortgage Company ("USACM") based upon an investment in a loan to Pegasus-MH Ventures I, LLC (the "Borrower"). This loan was sometimes referred to as the "Mountain House Loan" and that is how the USACM Trust will refer to it here. This Objection is supported by the Court's record and the Declarations of Geoffrey L. Berman and Edward M. Burr in Support of Omnibus



1 Objections to Proofs of Claim Based Upon the Investment in the Mountain House Loan.
 2 (the "Berman Decl." and "Burr Decl.").

3 THIS OBJECTION DOES NOT RELATE TO AND WILL NOT IMPACT THE
 4 DIRECT LENDERS' RIGHTS TO REPAYMENT ON THE MOUNTAIN HOUSE
 5 LOAN, SHARE IN ANY PROCEEDS GENERATED FROM THE SALE OF THE
 6 REAL PROPERTY SECURING THE MOUNTAIN HOUSE LOAN OR SHARE IN THE
 7 RECOVERY OF ANY FUNDS FROM THE GUARANTOR FOR THE LOAN.

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **I. BACKGROUND FACTS**

10 **a. The USACM Bankruptcy**

11 On April 13, 2006 ("Petition Date"), USACM filed a voluntary petition for relief
 12 under chapter 11 of the Bankruptcy Code. Debtor continued to operate its business as
 13 debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.
 14 Debtor's post-petition management of the Debtor was under the direction of Thomas J.
 15 Allison of Mesirow Financial Interim Management, LLC, who served as the Chief
 16 Restructuring Officer.

17 USACM was a Nevada corporation that, prior to the Petition Date, was in the
 18 business of underwriting, originating, brokering, funding and servicing commercial loans
 19 primarily secured by real estate, both on behalf of investors and for its own account. That
 20 business included the solicitation of investors to purchase fractional interest in loans that
 21 USACM originated and then serviced. These investors are referred to as "Direct Lenders"
 22 in USACM's bankruptcy case and in this Objection.

23 On January 8, 2007, this Court entered its Order Confirming the "Debtors' Third
 24 Amended Joint Chapter 11 Plan of Reorganization" as Modified Herein [Docket No.
 25 2376]. As part of the Plan, and pursuant to an Asset Purchase Agreement filed with this
 26 Court, USACM sold the servicing rights to most of the loans it serviced to Compass



1 Partners, LLC and Compass Financial Partners, LLC ("Compass"), including the
 2 Mountain House Loan. The sale to Compass closed on February 16, 2007.

3 The USACM Trust exists as of the Effective Date of the Plan, which was March 12,
 4 2007. Geoffrey L. Berman is the Trustee. Under the Plan, the USACM Trust is the
 5 successor to USACM with respect to standing to seek allowance and disallowance of
 6 Claims under 11 U.S.C. § 502(a).

7 Upon information derived from filings in the United States District Court, District
 8 of Nevada, *3685 San Fernando Lenders Company, LLC, et al v. Compass USA SPE, LLC,*
 9 *et al*, No. 2:07-cv-00892-RCJ-GWF action, the Trust believes that "Silar Advisors, LP
 10 ("Silar") financed Compass' acquisition of the Purchased Assets, including the loan
 11 service agreements in the USACM bankruptcy case and took a secured interest in those
 12 Purchased Assets by executing a Master Repurchase Agreement ("Repurchase
 13 Agreement") with Compass, and by filing a UCC-1 financing statement with the State of
 14 Delaware." *Id.* Docket 1250 at 13-14 (citations to declarations omitted).

15 Further, from filings in the same action, the Trust believes that "Effective as of
 16 September 26, 2007, Silar foreclosed on Compass through Asset Resolution LLC ("Asset
 17 Resolution") and took ownership of the Purchased Assets. ... Silar created Asset
 18 Resolution as a 'single purpose entity,' conveyed all of its interests in the Repurchase
 19 Agreement to Asset Resolution, and Asset Resolution properly foreclosed on the assets of
 20 Compass, including the Purchased Assets." (Citations omitted.) Asset Resolution LLC is
 21 now a debtor in a chapter 7 bankruptcy case pending in Nevada, case no. BK-S-09-32824-
 22 RCJ, along with certain affiliates.¹ By Order entered on July 19, 2010 by the Hon. Robert
 23 C. Jones in the Asset Resolution Case, the servicing rights for 19 loans were transferred to
 24

25 ¹ 10 90 SPE LLC, Fiesta Stoneridge LLC, CFP Gramercy SPE LLC, Bundy 2.5 Million SPE LLC, CFP
 26 Cornman Toltec SPE LLC, Bundy Five Million LLC, Fox Hills SPE LLC, HFAH Monaco SPE LLC,
 Huntsville SPE LLC, Lake Helen Partners SPE LLC, Ocean Atlantic SPE LLC, CFP, Gess SPE LLC, CFP
 Mountain House SPE LLC, and Shamrock SPE LLC.



1 Cross, FLS. The Mountain House Loan, was among the loans whose servicing rights were
2 transferred to Cross, FLS.

3 The Trust has attempted to monitor loan collections through monitoring the district
4 court litigation and the ARC bankruptcy case, but has received limited information
5 concerning servicing and resolution of direct loans by Compass/Silar/Asset Resolution or
6 their successors, including the trustee in bankruptcy for Asset Resolution. The Trust's
7 legal counsel has also contacted Cross FLS about certain loans that it is servicing,
8 including the Mountain House Loan. The following is the extent of the USACM Trust's
9 information on the current servicing and status of the Mountain House Loan.

10 **b. The Mountain House Loan**

11 USACM circulated an Offer Sheet to prospective Direct Lenders soliciting funding
12 for an acquisition and development loan to a borrower identified as "Pegasus-MH
13 Ventures I, LLC." A copy of the Offer Sheet is attached hereto as **Exhibit B** and
14 incorporated by this reference. (Berman Decl., ¶ 4.) The total loan amount proposed was
15 \$9,750,000. The Offer Sheet described the investment as a "First Trust Deed Investment"
16 and noted that the investment would be secured by a first deed of trust on approximately
17 40 acres of undeveloped land planned for a residential development located near the
18 corner of Highway 205 and Mountain House road near Tracy, California. In addition, the
19 Offer Sheet provided that the investment would be secured by a second deed of trust on
20 approximately 130 acres of adjacent undeveloped land zoned for commercial
21 development, with approximately \$5 million in equity. The Offer Sheet further provides a
22 loan to value percentage of 50%, based on "comparative prices in the area, not including
23 the additional collateral, which provides additional net equity of \$10,600,000." Pursuant
24 to the Loan Agreement, the loan was intended to acquire the subject property, and to cover
25 some pre-development costs.

26

1 On June 10, 2004, Borrower made and delivered to various lenders, including the
2 Direct Lenders identified in **Exhibit A**, a “Promissory Note Secured by Deed of Trust”
3 (the “Note”) and a Loan Agreement. (Berman Decl., ¶ 5.) The Note and Loan Agreement
4 provided for a loan of \$6,960,000, with potential subsequent increases up to \$9,750,000.
5 The Note was secured by a “Deed of Trust, Assignment of Rents, Security Agreement and
6 Fixture Filing” from the Borrower in favor of the Direct Lenders that was recorded in the
7 official records of San Joaquin County, California on July 21, 2004 at Instrument Number
8 2004-160902, as were subsequent amendments to the Deed of Trust to secure subsequent
9 advances. Pursuant to the terms of the Deed of Trust, the Direct Lenders’ investment was
10 secured by a first position lien on what was defined therein as “Parcel 2” and a second
11 position lien on what was defined as Parcel 1, behind a purchase money deed of trust
12 recorded concurrently with the Deed of Trust. The Note was also supported by a Guaranty
13 executed by William Zenklusen and Michael Clevenger on June 10, 2004.

14 The USACM “Loan Summary” dated July 31, 2006 and filed in this case shows
15 that Borrower was “Performing” on the Note as of July 31, 2006, due to the fact that
16 sufficient cash was being held by the Disbursing Agent to pay the outstanding interest due.
17 Pursuant to the February 28, 2007 “Loan Summary” filed in this case, the loan was in
18 interest default as of February 2007. (Berman Decl., ¶ 6.) During this bankruptcy case
19 through the transfer of servicing to Compass, USACM treated the Direct Lenders with
20 respect to any interim payments by the borrower in accordance with this Court’s orders.

21 Counsel for the Trustee has been advised by a representative of Cross, FLS that the
22 first deed of trust covered a residential area, while the second deed of trust covered a
23 mixed use business park. The second deed of trust on the business park has been
24 foreclosed out, leaving only the residential area to secure the loan. The Borrower had
25 agreed to purchase the loan from the Direct Lenders for \$1.6 million, with the Direct
26 Lenders voting to accept the offer, but the Borrower was unable to obtain financing. The

1 Direct Lenders are not looking to foreclose on the property. One of the guarantors, passed
2 away recently (Mr. Zenklusen), and the other has become insolvent (Mr. Clevenger).

3 **c. The Mountain House Claims**

4 **Exhibit A**, attached, lists Proofs of Claim filed by Direct Lenders that appear to be
5 based entirely upon an investment in the Mountain House Loan. (Burr Decl. ¶ 7.)

6 **Exhibit A** identifies the Proof of Claim number, the claimant, the claimant's address, the
7 total amount of the claim and the total amount of the claim that appears to be related to an
8 investment in the Mountain House Loan based upon the information provided by the
9 claimant. (Burr Declaration ¶ 7.) The claims listed in **Exhibit A** are referred to
10 hereafter as the "Mountain House Claims." As required by Nevada LR 3007, a copy of
11 the first page of the proof of claim for each of the claims referenced in **Exhibit A** are
12 attached as **Exhibit C**.

13 **II. JURISDICTION**

14 The Court has jurisdiction over this Objection pursuant to 28 U.S.C. §§ 1334 and
15 157. Venue is appropriate under 28 U.S.C. §§ 1408 and 1409. This matter is a core
16 proceeding under 28 U.S.C. § 502 and Bankruptcy Rule 3007.

17 The statutory predicates for the relief requested herein are 11 U.S.C. § 502 and
18 Bankruptcy Rule 3007.

19 **III. APPLICABLE AUTHORITY**

20 Under the Bankruptcy Code, any Claim for which a proof of claim has been filed
21 will be allowed unless a party in interest objects. If a party in interest objects to the proof
22 of claim, the Court, after notice and hearing, shall determine the amount of the Claim and
23 shall allow the Claim except to the extent that the Claim is "unenforceable against the
24 debtor . . . under any . . . applicable law for a reason other than because such claim is
25 contingent or unmatured." 11 U.S.C. § 502(b). A properly filed proof of claim is
26 presumed valid under Bankruptcy Rule 3001(f). However, once an objection to the proof

1 of claim controverts the presumption, the creditor ultimately bears the burden of
2 persuasion as to the validity and amount of the claim. *See Ashford v. Consolidated*
3 *Pioneer Mortg. (In re Consolidated Pioneer Mortg.)*, 178 B.R. 222, 226 (9th Cir. B.A.P.
4 1995), *aff'd*, 91 F.3d 151 (9th Cir. 1996).

5 **IV. THE OBJECTION**

6 The Mountain House Loan appears to have been a legitimate, arms-length
7 transaction with a third party borrower. In addition, the Direct Lenders took a known risk
8 by investing in a promissory note secured by a lien on real property.

9 USACM is not liable for the Borrower's default or any decrease in the value of the
10 collateral.

11 The Direct Lenders fail to state a claim because USACM does not appear to have
12 breached the loan servicing agreements with respect to collection of the Mountain House
13 Loan. USACM was under no duty to foreclose on the collateral securing the Mountain
14 House Loan or take any other action.

15 This objection will not affect the Direct Lenders' right to be repaid on the Mountain
16 House Loan by the Borrower or to recover from the sale of any collateral that secured the
17 Mountain House Loan or on the guarantee supporting the Mountain House Loan.

18 **V. CONCLUSION**

19 The USACM Trust respectfully requests that the Court disallow the claims against
20 USACM listed in **Exhibit A** because those claims are based entirely upon an investment in
21 the Mountain House Loan. This objection concerns only claims based upon an investment
22 in the Mountain House Loan and not any other claims of any of the Direct Lenders. The
23 USACM Trust also requests such other and further relief as is just and proper.

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1 Dated: June 24, 2011

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3 LEWIS AND ROCA LLP

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8 Copy of the foregoing and pertinent
9 portion of Exhibits mailed by first
10 class postage prepaid U.S. Mail on
June 24, 2011 to all parties listed on
Exhibit A attached.

11 LEWIS AND ROCA LLP

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13 s/ Matt Burns
14 Matt Burns

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